

UNITED STATES DEPARTMENT OF ENERGY

PROPOSED RULEMAKING
RULE ON WORKER **SAFETY** AND HEALTH
PUBLIC HEARING

Wednesday, January 21, 2004

9:20 a.m.

DOE Panel Members

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Office of Worker Protection Policy and
Programs

ROY GIBBS
Office of Enforcement

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Office of Worker Protection Policy and
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Office of General Counsel

A G E N D A

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P R O C E E D I N G S

9:20 a.m.

Introductory Remarks

DR. McARTHUR: Good morning, and welcome.

I'm Bill McArthur, director of the Office of Worker Protection Policy and Programs, EH 52, within the Office of Environment, Safety, and Health. On behalf of the Department of Energy, I would like to thank you for taking the time to participate in this public hearing concerning the proposed Worker Safety and Health Rule, particularly those of you who have come from some distance.

The purpose of the hearing is to receive oral testimony from the public on DOE's notice of proposed rulemaking, the NOPR. Your comments are not only appreciated, they are essential to the process.

The comments received here today and those submitted during the comment period, which ends on February 6th, 2004, will assist the Department in the rulemaking process. All written comments must be received by this due date to ensure consideration by the DOE. The address for sending comments is Jacqueline D. Rogers; U.S. Department of Energy; EH-52/270 Corporate Square Boulevard; Docket No. EH-RM-03-WSH; 1000 Independence Avenue, Southwest; Washington,

1 D.C. 20585-0270.

2 Also, comments can be filed electronically on
3 the website established for the rulemaking process.
4 The Internet website is located at
5 <http://www.eh.doe.gov/whs/rulemaking>.

6 As the presiding official for this hearing, I
7 would like to set forth the guidelines for conducting
8 the hearing and provide other pertinent information.

9 This is not an evidentiary or judicial
10 hearing. It will be conducted in accordance with
11 Section 553 of the Administrative Procedures Act, 5 USC
12 Section 553; and Section 501 of the DOE Organizational
13 Act, 42 USC Section 7191.

14 To provide the Department with as much
15 pertinent information as many view -- and as many views
16 as can reasonably be obtained and to enable interested
17 persons in expressing their views, the hearing will be
18 conducted in accordance with the following procedures.

19 Speakers will be called to testify in the
20 order indicated on the agenda. Speakers will have
21 allotted 10 minutes for their verbal statements.
22 Anyone may make an unscheduled oral statement after all
23 scheduled speakers have delivered their statements. To
24 do so, please submit your name at the registration desk
25 before the conclusion of the last scheduled speaker.

1 And at the conclusion of all presentations,
2 scheduled speakers will be given the opportunity to
3 make a rebuttal or clarifying statement. To do so,
4 please give your name to the registration desk.

5 Only members of the DOE panel conducting the
6 hearing will be allowed to question the speakers.

7 In approximately 20 days, a transcript of
8 this hearing will be available for inspection and
9 copying on the website, at
10 <http://www.eh.doe.gov/whs/rulemaking>.

11 As mentioned earlier, the comment period will
12 close on February 6th, 2004. All written comments
13 received will be made available for public inspection
14 at the Internet web address. Three copies of comments
15 are requested.

16 If you have any questions concerning the
17 submission of comments, please contact Jacqueline
18 Rogers at 301-903-5684.

19 Any persons submitting information which he
20 or she believes to be confidential and exempt by law
21 from public disclosure should submit to the Washington,
22 D.C. comment address a total of four copies: one
23 complete copy with the confidential material-included
24 and three copies without the confidential information.

25 In accordance with the procedures established in 10

1 CFR 1004.11, the Department of Energy shall make its
2 own determination as to whether or not the information
3 shall be exempt from public disclosure.

4 We appreciate the time and effort you have
5 taken in preparing your statements and are pleased to
6 receive your comments.

7 I'd like to now introduce the panel that's
8 joining me today: Mr. Roy Gibbs from the Office of
9 Enforcement and Mrs. Jacqueline Rogers from the Office
10 of Worker Protection Policy and Programs.

11 Now I'd like to call the first speaker on the
12 agenda. For the record, I am asking each speaker to
13 state his or her name and whom you represent before
14 making your statements. Thank you.

15 Our first speaker is Jane Preston.

16 MS. PRESTON: Jan Preston. Jan, J-A-N.

17 DR. MCARTHUR: I'm sorry.

18 Statement of Ms. Jan Preston

19 Oak Ridge National Laboratory

20 MS. PRESTON: Good morning. My name is Jan
21 Preston, and I'm currently the vice president of
22 environment, safety, health, and quality for the
23 Battelle Memorial Institute. However, for the past
24 four years, I served as the director of independent
25 oversight and head of the P-AAA Program for UT-Battelle

1 at the Oak Ridge National Laboratory, and that is who I
2 represent today. We appreciate the opportunity to
3 comment on DOE's proposed rulemaking on worker safety
4 and health.

5 UT-Battelle is owned in part by Battelle,
6 which is also the management and operating contractor
7 for the Pacific Northwest National Laboratory and a
8 partner in the management of Brookhaven National
9 Laboratory. Battelle and our partners understand our
10 worker health and safety responsibilities, and we fully
11 expect DOE to hold us accountable for our safety
12 performance.

13 Congress directed DOE to promulgate
14 regulations on worker safety and health rather than to
15 rely exclusively on a contractual approach. With these
16 proposed regulations, it was DOE's expressed intent to
17 maintain the high level of protection that currently
18 exists in the DOE complex. The proposed rule is
19 currently a draft; however, it presents numerous
20 concerns to us.

21 Today I will address two primary areas of
22 concern. First, the proposal to model the worker
23 safety and health regulations after DOE's nuclear
24 safety regulatory program fails to take advantage of
25 over 30 years of workplace policy and practice

1 established by the Occupational Safety and Health
2 Administration, or OSHA. This approach will not
3 achieve the efficiency and credibility that an OSHA-
4 type program could, and may not be responsive to the
5 statutory mandate. Second, the currently proposed
6 enforcement process currently lacks both definition and
7 clarity.

8 We recognize that these draft DOE regulations
9 respond to a congressional directive. However, the
10 proposed rule misses the opportunity to accommodate the
11 complementary interest expressed by Congress in other
12 legislation and shared by many other stakeholders,
13 including the labs, to have the DOE science
14 laboratories transition to external regulation by OSHA
15 and the NRC.

16 We believe a worker safety and health program
17 that more closely aligns with OSHA would provide DOE
18 and its contractors with valuable experience that could
19 enhance and make more cost-effective the future
20 transition to external regulation separately
21 recommended by Congress.

22 DOE and its contractors have been criticized
23 for self-regulation in the areas of worker safety and
24 health. Our critics most frequently note that we do
25 not follow the national standards established to

1 protect all American workers. However, with this draft
2 rule, DOE proposes a regulatory scheme for worker
3 safety and health that is very different from the OSHA
4 approach.

5 Over the past 11 years, I have become very
6 familiar with DOE's nuclear safety management
7 regulations through both my work at ORNL and my
8 previous experience at the Defense Nuclear Facility
9 Safety Board. Those regulations were conceived to
10 address the unique operations and management structure
11 within DOE's nuclear enterprise and, as a result, are
12 process-based regulations. This process-based
13 regulatory scheme for that specific application has had
14 success in driving improvements.

15 Unlike DOE's nuclear hazards, however, its
16 occupational safety and health hazards are not unique.
17 They reflect the hazards found in general industry.
18 We are convinced that the scientist at the bench, the
19 technician supporting research work, and the
20 maintenance worker all would benefit more from the
21 establishment of a clear, proven set of standards for
22 operational safety rather than the very complex and
23 highly variable regulatory scheme proposed in this
24 rule.

25 In May and June of 2003, OSHA conducted a

1 pilot oversight assessment at ORNL to identify non-
2 compliances with OSHA standards and develop a position
3 on the viability of external regulation of the lab.
4 The OSHA inspectors identified no issues that were not
5 currently covered by its established standards and
6 approach.

7 Battelle and our partners in managing DOE's
8 labs continue to believe that external regulation is
9 the best approach for maintaining and improving worker
10 health and safety. Based on my experience as a senior
11 oversight officer at ORNL and elsewhere, I'm convinced
12 that external regulation at our laboratories would work
13 better than the currently proposed set of regulations.

14 However, in the absence of external
15 regulation and in order to comply with the legislative
16 mandate, we believe that DOE should move to establish
17 its set of worker health and safety standards to be as
18 much like OSHA as possible. In other words, it would
19 be much preferable for DOE's approach to be based upon
20 the existing set of well-defined federal and state
21 regulations rather than on the approved safety plan
22 approach proposed in this draft rule.

23 Under the proposed rule, which has been
24 drafted to closely mirror 10 CFR 830, Subpart A,
25 Quality Assurance Requirements, the contractor would be

1 principally regulated and accountable for following its
2 own myriad of derived policies and procedures rather
3 than specific compliance requirements and outcomes.
4 Again, we believe that both DOE's and Congress's
5 objective of maintaining a high level of worker
6 protection is best served by using existing national
7 standards and enforcement procedures.

8 The second issue I'd like to address is the
9 need for clarity in DOE's proposed enforcement process
10 for this new rule. The proposed rule, including its
11 Appendix B, fails to set forth clear, understandable
12 definitions or procedures as to how DOE's enforcement
13 arm will initiate and carry out enforcement actions.
14 For example, the notice does not address minimum
15 thresholds for reporting violations, or the point at
16 which action will be taken by DOE.

17 The proposed rule also doesn't address the
18 classification and categorization of violations. These
19 issues were raised during a videoconference DOE held on
20 the proposed rule but were not satisfactorily resolved.

21 Our workers need to be able to understand how
22 this process will work to protect them, what the rules
23 explicitly are, and when and how these rules will be
24 invoked. Contractors cannot fully evaluate the impact
25 the new rule will have on resources and workload until

1 these critical pieces of the enforcement policy are
2 defined. In effect, contractors would be asked to
3 accept additional financial risk before the approach to
4 quantifying that risk has been developed.

5 DOE has not been clear how investigations and
6 inspections will be conducted. The draft rule fails to
7 identify what triggers will be used as the basis for
8 convening of an informal conference and subsequent
9 enforcement action. For instance, there's a question
10 of whether DOE Type A and B investigations or
11 inspections by DOE elements other than OE could result
12 in enforcement action.

13 If DOE intends to use Type A and B
14 investigations as the basis for legal action against
15 the contractor, contractors must have the opportunity
16 to contest findings in such investigation reports.
17 Currently, these reports are finalized without our
18 being allowed to either investigate the events
19 separately or even to comment on the findings.
20 Likewise, there is no procedure for contesting or
21 overturning findings we believe to be inaccurate.

22 The proposed rule also fails to address
23 whether DOE will use contractor self-assessments as the
24 basis for enforcement. It's important to note that
25 OSHA does not use employer self-assessments as a means

1 of identifying patterns of non-compliance for
2 enforcement. If DOE chooses to use contractor self-
3 assessments and enforcement actions, this may have a
4 chilling effect, potentially driving contractor
5 reporting underground since there would be a natural
6 reluctance to produce such self-incriminating
7 information. Consistent with the congressional
8 mandate, we believe that DOE should adopt a policy
9 similar to OSHA's on self-assessments.

10 To summarize, UT-Battelle and our fellow
11 Battelle-affiliated labs are committed to ensuring the
12 safety and health of our workers. We understand
13 Congress's mandate in this area. Workers need to
14 understand what the rules are and how and when they
15 will be enforced. It is our view that the best
16 regulatory process for worker safety and health already
17 exists. If DOE promulgates a new rule to respond to
18 Congress, we believe you should adopt OSHA-like
19 standards and take advantage of over 30 years of
20 broadly applied regulatory experience.

21 A process-based regulatory enforcement scheme
22 will be difficult for our scientists, technicians, and
23 maintenance workers to understand and implement, and
24 will not be transparent to Congress or to the public.
25 We believe that an enforcement process like that used

1 by OSHA would provide much more clarity, and we
2 recommend that DOE develop and articulate such a
3 process before the rule is issued.

4 In conclusion, I again want to thank you for
5 the opportunity to comment on the proposed regulation.

6 I appreciate your time and attention. UT-Battelle
7 will be submitting a set of formal comments on the
8 proposed rule in accordance with the notice.

9 DR. MCARTHUR: Thank you, Ms. Preston.

10 Do we have anybody else who would like to
11 make a statement? At this time we have no other
12 scheduled presenters.

13 (No response)

14 DR. MCARTHUR: Okay. Well, thank you. We're
15 going to close, then, and we will readjourn at 1:30.

16 MS. ROGERS: No. If someone walks in --

17 DR. MCARTHUR: Oh, if someone walks in.
18 Okay.

19 (Brief recess)

20 DR. MCARTHUR: It is now 12 noon, so we are
21 going to close the meeting until 1:30 this afternoon,
22 at which time we will have two speakers that are
23 registered and anyone else that shows up.

24 So everyone have a nice lunch.

25

1 (Whereupon, at 12:00 p.m., the proceedings
2 were adjourned for lunch, to reconvene at 1:30 p.m.,
3 the same day.)
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A F T E R N O O N S E S S I O N

1:30 p.m.

Introductory Remarks

DR. McARTHUR: Good afternoon. I would like to read our introductory comments into the record.

Good afternoon, and welcome. I'm Bill McArthur, director of the Office of Worker Protection Policy and Programs, EH 52, within the Office of Environment, Safety, and Health. On behalf of the Department of Energy, I would like to thank you for taking time to participate in this public hearing concerning the proposed Worker Safety and Health Rule, particularly those of you who have come for some -- come from some distance.

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1 Square Boulevard; Docket No. EH-RM-03-WSH; 1000
2 Independence Avenue, Southwest; Washington, D.C. 20585-
3 0270.

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25 D.C. comment address a total of four copies: one

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5 shall make its own determination as to whether or not
6 the information shall be exempt from public disclosure.

7 We appreciate the time and effort you have
8 taken in preparing your statements and are pleased to
9 receive your comments.

10 I'd now like to introduce the panel with me
11 today: Roy Gibbs from the Office of Enforcement and
12 Jacqueline Rogers from the Office of Worker Protection
13 Policy and Programs.

14 I would now like to call the first speaker on
15 our agenda. For the record, I am asking each speaker
16 to state his or her name and whom you represent before
17 making your statements. Thank you.

18 The first speaker we have is Timothy J. Keys,
19 M.D.

20 Dr. Keys, would you like to make your
21 statement?

22 Statement of Dr. Timothy J. Key
23 American College of Occupational and Environmental
24 Medicine

25 DR. KEY: Thank you.

1 I'm representing the American College of
2 Occupational and Environmental Medicine. My name is
3 Timothy Key. I'm a board certified residency trained
4 occupational medicine- physician. I have practiced in
5 the field of occupational medicine for over 21 years,
6 and I've served as a consultant to the Department of
7 Energy regarding occupational medicine issues,
8 specifically evaluation and review of various medical
9 departments at DOE sites and consulting regarding
10 specific occupational medicine issues at DOE sites.

11 I am the president elect of the American
12 College of Occupational and Environmental Medicine,
13 also known as ACOEM. ACOEM is an international
14 organization of 6000 occupational physicians and other
15 health professionals that provide leadership to promote
16 optimal health and safety of workers, workplaces, and
17 environment. Occupational and environmental medicine
18 is the medical specialty devoted to the prevention and
19 management of occupational and environmental injury,
20 illness and disability, and the promotion of health and
21 productivity of workers, their families, and
22 communities.

23 ACOEM's mission is to promote optimal health
24 and safety of all workers. Congress has recognized
25 ACOEM's role with respect to workers at DOE facilities.

1 The 1993 Defense Reauthorization Act, for example,
2 asked the Secretary to consult with ACOEM when
3 establishing the program to monitor workers' exposure
4 to hazardous and radioactive substance.

5 The proposed rule, "Worker Safety and
6 Health," is an important part of a continuing process
7 to ensure the health and safety of DOE workers. There
8 are several issues, however, that warrant further
9 discussion prior to the final rulemaking.

10 We question the approach presented by DOE, in
11 the proposed rule with respect to the use of national
12 standards. With the exception of the beryllium
13 standard, the proposed regulations do not mandate the
14 selection of any particular standard or program,
15 including those described in Appendix A. Rather, the
16 proposed regulations obligate a contractor to focus on
17 the objective of safe and healthy workplaces and to
18 select a set of standards and programs that will
19 achieve a level of protection at least substantially
20 equivalent to the level of protection that existed in
21 comparable DOE workplaces in 2002.

22 ACOEM believes that the final rule should
23 require that the Worker and Health -- Worker and Safety
24 Health Program include compliance with applicable
25 national standards, including the OSHA standards, as

1 the preferred method of achieving safety and health
2 protection. The standards listed in Appendix A and the
3 current DOE Order, 440 -- 440.1A, Worker Protection
4 Management for DOE Federal and Contractor Employees,
5 which includes Chapter 19, 'Occupational Medicine, the
6 level of protection currently provided to such workers
7 at such facilities to -- I'm sorry.

8 The Worker Protection Management for DOE
9 Federal and Contractor Employees, which includes
10 Chapter 19, Occupational Medicine, should be
11 incorporated into the final rule. Governmental and
12 industry standards play a key role in health risk
13 management. When they exist, compliance with standards
14 is by far the most cost effective method of assuring
15 safety and health protection. For common hazards,
16 standards can -- standards eliminate duplication of
17 efforts each employer would have to expend in analyzing
18 the degree of risk and the methods needed to reduce the
19 risk to an acceptable level.

20 Further, ACOEM believes that the DOE guidance
21 document should be explicitly included by the
22 contractor in the Worker Safety and Health Program.
23 These guidance documents have been and will continue to
24 be an important part of ensuring worker health and
25 safety.

1 We believe that the proposed rule has
2 misinterpreted the legislative mandate in Public Law
3 107-314. We interpret the statement in Section 3173 of
4 Public Law 107.314, quote, "provide a level of
5 protection for workers at such facilities that is
6 substantially equivalent to the level of protection
7 currently provided to such workers at such facilities,"
8 unquote, to mean that the health and safety programs
9 will continue to be based on the most current
10 government and industry standards. The proposed rule's
11 reference to a level of protection equivalent to the
12 standards in place in 2002 is confusing and not
13 justified by the legislation.

14 The DOE proposes to use written programs and
15 the annual review of these to establish the mandatory
16 requirements for safety and health protection of its
17 sites. The DOE proposed rule, however, does not
18 establish the expectation for the involvement of
19 technically qualified individuals. The design,
20 implementation, and improvement of safety and health
21 protection programs require the involvement of
22 technically qualified practitioners. The final rule
23 should require the involvement of technically qualified
24 individuals in the preparation and review of these
25 written programs and in the operation of safety and

1 health protection programs.

2 DOE should set and enforce a set of generic
3 performance standards as part of the final rule. A
4 basic problem in standards development is that not
5 every hazard can be addressed individually with a high
6 specific -- with a highly specific standard such as the
7 DOE standard for beryllium. Therefore, generic
8 performance standards fill this gap, and as such,
9 generic regulatory standards with guidelines for
10 medical surveillance, hazard training for employees,
11 and the occupational health and safety program.

12 I would like to thank the panel for the
13 opportunity to make this presentation, and if there are
14 questions, I'm available at this time and can provide
15 more in-depth responses later if necessary.

16 Thank you.

17 MS. ROGERS: Dr. Miller, will you be
18 providing -- I'm sorry. Dr. --

19 DR. KEY: Key.

20 MS. ROGERS: Key, I'm sorry.

21 DR. KEY: That's all right.

22 MS. ROGERS: Will you be providing an
23 additional statement or do you want this entered as an
24 official record?

25 DR. KEY: We would like this entered as the

1 official record.

2 MS. ROGERS: And additional comments; will
3 you be providing additional comments?

4 DR. KEY: If they're needed;

5 MS. ROGERS: Okay. Thank you.

6 DR. McARTHUR: Thank you, Dr. Key.

7 Before I call our next speaker, I'd just like
8 to introduce Mr. Ben McRae from the Office of General
9 Counsel for DOE, who's just joined us as another panel
10 member.

11 Our next speaker, then, is Richard Miller.

12 MR. MILLER: I'm sorry. Who --

13 MR. McRAE: Ben McRae.

14 MR. MILLER: Oh, good. Just who I wanted to
15 meet.

16 Statement of Richard Miller

17 Government Accountability Project

18 MR. MILLER: Greetings. My name is Richard
19 Miller. I'm a senior policy analyst with the
20 Government Accountability Project.

21 GAP is a not-for-profit, public interest
22 organization which represents whistleblowers and has a
23 project to hold DOE accountable for its environmental
24 safety and health impacts within the weapons complex.
25 We offer the vantage point in offering our comments

1 today of having worked with Congress and the offices of
2 Senator Bunning, Kennedy, and the Armed Services
3 Committee in the development of this legislation, which
4 we'll note for the record DOE opposed.

5 It is really dark here. It just may be a
6 function of my old age, but allow me.

7 The first point I'd like to raise today has
8 to do with the downgrading of DOE's safety orders into
9 guidance. The proposed rule at 10 CFR 851 transforms
10 the DOE Order 440.1A into guidance and makes it
11 explicitly unenforceable. This is at odds with Section
12 3173 and the accompanying report language.

13 I'm going to just highlight several parts of
14 the legislation rather than read it into the record
15 now. But the key points are, one, that there were --
16 that the DOE contractors operate under Order 440.1A
17 today and the legislation calls for a level of
18 protection at such facilities substantially equivalent
19 to the level of protection provided to such workers at
20 such facilities.

21 So Congress provided very clear guidance to
22 the Department of Energy to promulgate Order 440.1A
23 into a rule. But instead, what happened is DOE
24 downgraded Order 440.1A into guidance', and it did so
25 without any statutory authority whatsoever provided in

1 Section 3173. In fact, Congress was concerned that DOE
2 was going to downgrade Order 440.1A into guidance, and
3 that's part of the motivation that led them to enact
4 this legislation to start with, because there was a
5 deregulatory effort under foot led within the General
6 Counsel's Office and elsewhere to downgrade or-cancel
7 Order 440.1A.

8 As a result, what DOE has done instead was,
9 it took the flexibility clause, expanded it and
10 stretched it like a rubber band so it's virtually
11 unrecognizable any longer, and used it as the loophole
12 through which it creates the requirement for site-by-
13 site health and safety plans instead of having a
14 uniform minimum level of health and safety which is
15 rooted directly in Order 440.1A and its provisions
16 which incorporate OSHA's regulations, the DOE
17 Explosives Manual, certain hierarchies of controls,
18 beginning with engineering controls and ending with
19 personal protective equipment.

20 This is clearly an overreaching
21 interpretation of the flexibility clause. It allows
22 contractors who are going to write these health and
23 safety plans, which will be the guiding document for --
24 which will determine what is enforceable and what is
25 not, to simply pick and choose what standards they want

1 to put in safety plans subject to DOE's program office.

2 (Interruption)

3 MR. MILLER: Excuse me.

4 (Pause)

5 MR. MILLER: Sorry about that. Sorry. -Sorry
6 about that.

7 That's much better. Thank you.

8 As I was saying, the -- the flexibility
9 clause has some very specific provisions, and it -- and
10 its scope was clarified both in the statute and in
11 report language. The scope of the flexibility clause
12 initially said, come up with implementation -- tailor
13 implementation of regulations -- so it's tailoring the
14 implementation of the regulations -- to reflect
15 activities and hazards associated with a particular
16 work environment, to take into account special
17 circumstances at a facility which is or isn't expected
18 to be permanently closed, or to achieve national
19 security missions.

20 Well, what is meant by the phrase, "reflect
21 activities and hazards with a particular work
22 environment"? The report language guides in this
23 respect and says that exception in flexibility is
24 allowed where there are unique site or mission
25 circumstances such as a closing facility. So we're

1 only dealing with unique circumstances, but somehow,
2 out of that narrow scope of flexibility, DOE has come
3 up with a very expansive reading of the word
4 "flexibility" and now allows site-by-site health and
5 safety plans, not a uniform minimum standard.

6 What's peculiar about this is that every
7 private sector employer in the United States has to
8 comply with OSHA, but somehow, when they come to DOE,
9 they get site-specific health and safety plans. And my
10 question is, what's so special about DOE that you don't
11 have a uniform minimum bedrock floor of safety
12 standards applied uniformly across the DOE complex,
13 with the obvious exceptions provided.

14 This rule effectively authorizes a diminution
15 in worker safety and is exactly the opposite of what
16 Congress intended for holding contractors accountable
17 in a nuclear weapons complex. And since contractors
18 are not held accountable by external regulators such as
19 OSHA and NRC, Congress intended in Section 3173 that
20 DOE promulgate a uniform set of standards and make them
21 enforceable.

22 This argument is particularly compelling
23 since the nuclear safety rules were authorized to
24 become enforceable as a result of the 1988 Price
25 Anderson Act amendments, and now it was time for

1 nuclear safety rules and now it was time to move to
2 industrial and construction safety.

3 What are the consequences of allowing the
4 flexibility exception to swallow the rule; will
5 downgrading Order 440.1A into mere guidance result in
6 the diminution of worker safety; is this an anti-worker
7 rule; and is this designed to let contractors off the
8 hook for violating safety rules? The answer is yes.
9 And is this what Congress had intended? Absolutely
10 not.

11 One egregious consequence of DOE's proposal
12 to downgrade Order 440.1A into a guidance docket --
13 document is that DOE is prohibited from inspecting or
14 enforcing any violations of the OSHA standards found in
15 440.1A unless the contractor puts them in their safety
16 plan first. Now, granted these safety plans have to be
17 reviewed and approved by DOE, but they're being done by
18 the field offices, which both last -- lack staff and
19 expertise and generally serve as a rubber stamp for the
20 contractor.

21 Let me read you what the preamble says with
22 respect to this prohibition on enforcement of any OSHA
23 violation. It says:

24 "Section 851.8(a) would make clear to
25 contractors and DOE officials that guidance

1 documents do not create legally enforceable
2 requirements."

3 Moreover, DOE officials are:

4 "prohibited from inspecting or investigating
5 a DOE site to identify violations of proposed
6 regulations by determining whether a
7 contractor's actions or omissions were
8 consistent with a guidance document."

9 This is incredible. If it's in Order 440.1A
10 but it didn't turn up in the plan, you can't inspect
11 for it.

12 How large is this loophole? Well, let's look
13 at the Hanford Tank Farms. Hanford Tank Farms have
14 toxic vapors venting from the tanks right now. We have
15 seen a large number of workers made sick out there.
16 Many, many of these chemicals are not characterized and
17 they're not in the toxic exposure limits in the
18 contractor's health and safety plan at that site today.

19 In fact, that contractor doesn't even have an approved
20 industrial hygiene monitoring plan out there right now.

21 Nonetheless, while workers are getting sick,
22 if it's not in the health and safety plan, can't
23 inspect, can't enforce. You're out of luck.

24 So I guess the question I have is, why would
25 barring the gate and putting a lock on it with respect

1 to inspection and enforcement of health and safety
2 rules, regardless of the degree of risk or hazard, make
3 for good safety policy, and how is this going to keep
4 workers from getting sick from work-related exposures.

5 The second fallacy or problem with
6 downgrading Order 440.1A into guidance is that it
7 eliminates it as a contractual requirement. So it's a
8 get-out-of-jail-free card for DOE contractors, which
9 currently have clauses that say you must abide by all
10 DOE orders. Thus contracting officers will be stripped
11 of a fundamental authority and award fees will no
12 longer be tied to general compliance with this order,
13 which today averages approximately 5 percent of an
14 award fee.

15 Moreover, this is directly at odds --
16 downgrading this -- this order into guidance is at odds
17 with the recommendations of the Defense Nuclear Safety
18 Board from their letter of March 29th, 2002, when some
19 individuals in DOE, particularly in the General
20 Counsel's Office, sought to downgrade this to guidance.
21 And yet, DOE staff assured Congress when this statute
22 was being legislated that DOE did not intend to
23 downgrade Order 440.1A into guidance. What has
24 happened to that assurance? I guess it's sort of you
25 say whatever you have to say to get through the day.

1 In sum, DOE's proposed rule undermines the
2 purpose of Section 3173, which was to make all of the
3 provisions of Order 440.1A a generally applicable rule
4 with the force and effect of law and limit exceptions
5 to circumstances that are unique or enforcement is
6 illogical, such as upgrading building safety when
7 you're about to tear it down.

8 This rule may help contractors meet their
9 milestones and win award fees, but it will be at the
10 expense of protecting workers, and it codifies
11 contractor immunity instead of promoting contractor
12 accountability with safety. This, to me, looks like a
13 product of the endless revolving door between DOE
14 contractors and the government.

15 There is no minimum exposure rule for toxic
16 substances, except for beryllium. We agree with making
17 the beryllium standard enforceable and we commend the
18 DOE for doing so but find it inconsistent with private
19 sector OSHA requirements where all toxic exposure
20 standards are enforceable. It is utterly illogical for
21 the rule to bar enforcement of every OSHA or ACGIH
22 toxic exposure standard except beryllium unless
23 included by the contractor in their safety plan. We
24 recommend that all toxic exposure provisions in Order
25 440.1A be included in the rule as a mandatory item of

1 compliance.

2 At this point, to underscore our concerns,
3 I'm submitting for the record a report called "Knowing
4 Endangerment: Worker Exposure to Toxic Vapors at the
5 Hanford Tank Farm," dated September 2003, which
6 documents exposures that made workers sick at the
7 Hanford Tank Farms between July of 1987 and January of
8 1992 and again between January of 2002 and August of
9 2003.

10 And if this is the level of standard that
11 went into effect in 2002 to which contractors will be
12 held accountable while workers are breathing in
13 ammonia, breathing in organics, their lungs are
14 weeping, they're coughing up blood, they're over --
15 being overcome by chemical vapors and being taken to
16 the hospital, if that is the level of protection which
17 is called for in this rule, then this is simply
18 unacceptable.

19 Third, I'd like to note that the entire
20 backbone of this safety rule is contractor self-
21 reporting. We believe that staffing should be far
22 greater than the one person reportedly tasked so far to
23 implement the entire rule. Annual site inspections
24 should be required in facilities where there is more
25 than one self-reported serious violation per month or

1 site-wide **OSHA** reports in excess of that found at the
2 best-performing company in the industry.

3 Workers should be trained and deputized to
4 report violations if DOE lacks sufficient people to
5 police its sites. And self-reporting should be for any
6 violations which have the potential for illness or
7 injury. Near misses should be reported, and the
8 database should be made available to affected workers
9 and their representatives, provided they have the
10 necessary security clearances if restricted information
11 is involved.

12 Safety professionals reporting to the Office
13 of Enforcement should be authorized to conduct
14 unannounced inspections without constraint with the
15 necessity of putting the purpose of such inspection in
16 writing as proposed in the rule.

17 OSHA doesn't need to limit itself during an
18 inspection to written criteria nor does it have to
19 provide advance notice, and DOE should not limit its
20 enforcement officials to providing reasons in writing,
21 particularly at sites that DOE owns itself, nor should
22 it be providing advance notice.

23 Finally, workers will not be receiving under
24 this rule any guarantee of confidentiality when making
25 complaints. It provides discretion to the Office of

1 Enforcement on whether to honor confidentiality of
2 employee complaints. And if DOE wants to breach the
3 employee's confidentiality, it retains that discretion
4 under Section 851.201. By contrast, the OSHA
5 regulations at 29 CFR 1903.11(a) assures anonymity of
6 referrals for investigation and complaints.

7 DOE should provide employees with the same
8 rate -- right to retain absolute, 100 percent
9 confidentiality in making a complaint. DOE workers
10 should enjoy the same protections afforded to employees
11 in the private sector. The mere provision of anti-
12 retaliation language is insufficient as employers will
13 use other pretexts to fire or discipline employees who
14 make complaints.

15 We also would urge, as we will put in our
16 written comments, greater employee involvement in the
17 enforcement proceeding and participation in settlement
18 conferences as is authorized under OSHA. We believe
19 that federal employees are improperly included in this
20 rule and it creates a conflict with FEOSH.
21 Furthermore, we believe that FEOSH provides a superior
22 level of health and safety protection.

23 We believe the rule should address indoor air
24 quality and ergonomic hazards.

25 And we have a number of questions for the

1 record, the first of which, does -- if this rule is
2 drafted -- as drafted is enacted, does it cancel Order
3 440.1A. Does DOE plan to cancel this order.

4 Two, has DOE consulted with the Defense
5 Nuclear Facility Safety Board on downgrading Order
6 440.1A to guidance, and does the DNFSB concur with
7 DOE's proposal.

8 Third, why did DOE shift from standards-based
9 rules contained in Order 440.1A to what appears to be a
10 -- an expert, risk-based approach to safety where each
11 safety standard is developed on a site-specific basis
12 with its own expert.

13 Certain individuals have been trying to
14 cancel this order for a number of years in the Office
15 of General Counsel, including one on the panel today,
16 Mr. McRae. We'd like to know what Mr. McRae's safety
17 qualifications are for proposing the downgrading of
18 Order 440.1A.

19 And finally, we're concerned that the right
20 to refuse unsafe work is being watered down
21 unnecessarily. Workers should not only have stop work
22 authority but the right to refuse unsafe work if they
23 are exposed to carcinogens, radionuclides, corrosives,
24 ammonia, or other hazards.

25 In conclusion, Section 3173 states that DOE

1 may not diminish or otherwise affect the enforcement or
2 application of any other law, regulation, order, or
3 contractual obligation relating to worker health and
4 safety. DOE is plainly violating the law with this
5 proposed rule. It is clearly diminishing levels of
6 health and safety, and we would urge DOE to withdraw
7 this rule, start all over again, and listen more
8 carefully to what Congress told you.

9 Thank you.

10 DR. McARTHUR: Any questions from the panel?

11 (No response)

12 DR. McARTHUR: Thank you, Mr. Miller.

13 Do we have any other requests to speak at
14 this time from the audience?

15 (No response)

16 DR. McARTHUR: Any rebuttals?

17 (No response)

18 DR. McARTHUR: Okay. Then I'd like to close
19 the recording session until or if we receive any other
20 individuals that come in up to the closing time of --
21 what's it? 5:00? -- 5:00. Thank you.

22 (Brief recess)

23 DR. McARTHUR: It's approximately two minutes
24 to five. We have an empty room, so we're closing the
25 public hearings for 851.

1 Thank you.

2 (Whereupon, at 4:58 p.m., the proceedings
3 were concluded.)

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1 REPORTER'S CERTIFICATE

2

3 This is to certify that the attached
4 proceedings before:

5 UNITED STATES DEPARTMENT OF ENERGY

6 In the Matter of:

7 PROPOSED RULEMAKING

8 RULE ON WORKER SAFETY AND HEALTH

9 PUBLIC HEARING

10 were held as herein appears and that this is the
11 original transcript thereof for the file of the
12 Department, Commission, Board, Administrative Law Judge
13 or the Agency.

14 Further, I am neither counsel for or related
15 to any party to the above proceedings.

16

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18

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Lisa Dennis
Official Reporter

20

21 Dated: January 26, 2004